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Corporate Social Responsibility, Social Contract, Corporate Personhood and Human Rights Law: Understanding the Emerging Responsibilities of Modern Corporations.

OLUFEMI AMAO⁺

Abstract

The social contract theory has been advanced as a theoretical basis for explaining the emerging practice of Corporate Social Responsibility (CSR) by corporations. Since the 17th century the social contract concept has also been used to justify human rights. The concept is the constitutional foundation of many western states starting with England, US and France. Business ethicists and philosophers have tried to construct and analyse the social responsibility of corporations from a social contract perspective without linking it to human rights or the political social contract. This paper posits that there is no need for a separate social contract between society and business and that a proper understanding of the legal status of today's corporation would recognise them as new entrants into the existing social contract. The consequence of this for international human rights law will be that corporations as 'persons' will stand in the same position as natural persons under the law.

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Introduction

The argument of this paper is that the modern corporation has acquired a status that is akin to that of a person under the law and should be treated as such in determining its social responsibility and its responsibilities under international human rights law. In arriving at this conclusion, the paper analyses the implication of Corporate Social Responsibility (CSR) from a legal perspective, examines the moral foundation of the concept and placed this examination within the context of the theoretical understanding of the personhood of the corporation. The paper posits that since the social contract has been very influential in the construction of State and individual responsibility, it will be necessary to examine the role of the corporation within the social contract and thus understand the position of the corporation under international human rights law. The social contract concept has been very influential in the political context and the attempt here is to extend the concept to corporations in a logical way. The original understanding of the social contract postulates that society decides to move from a situation of undefined rights and incessant conflict over resources to a society under a social contract whereby individuals agree to honour the rights of others in return for guarantees that their own rights will be respected and protected. The State is the repository in which individuals vest authority to ensure that the terms of the contract are complied with. The State thus mediates between individuals and between individuals and society. It has been suggested that the idea of corporate social contract underlies the CSR concept.¹ The idea is that corporate social contract concerns ‘a firm’s indirect societal obligations and resembles the “social contract” between citizens and government traditionally discussed by philosophers who identified the reciprocal obligations of citizen and state’.² Thus business should act in a responsible manner because it is part of society and also enter into a social contract with society. From this perspective CSR is described as ‘the obligation stemming from the implicit “social contract” between business and society for firms to be responsive to society’s long-run needs and wants, optimizing the positive effects and minimizing the negative effects of its actions on society’.³

¹ Geoffrey P Lantos, ‘The Boundaries of Strategic Corporate Social Responsibility’ (2001) 18 *Journal of Consumer Marketing*, 595-632.

² Ibid.

³ Ibid. Lantos has however critiqued the social theory has been vague, as it is not in writing, varies from place to place and does not indicate to what extent the corporation should be conceived as a public as against private enterprise and the relevance of firms size to the equation.

What Questions does CSR raise for Law?

CSR has emerged as the voluntary way in which companies respond to issues for which it is generally assumed they have no legal responsibility such as the promotion and protection of human rights and social welfare.⁴ The argument is always that as private actors, corporations are not designed to take on such responsibilities.⁵ The move by companies to adopt CSR as a philosophy is partly driven by the difficulty which has been experienced in imposing such a concept on corporations by legally binding rules.⁶ Furthermore, corporations generally argued against the construction of moral duty to act otherwise than for the interest of shareholders. However because of the relentless pressure from civil societies, activists, media and consumers, corporations have found it fashionable to adopt the concept of CSR. This approach gives the leaders of the corporate domain the ability to determine what CSR should be and the scope of such voluntary responsibility.⁷ The widespread acceptance of moral obligation can be inferred from the wide adoption of voluntary initiatives such as statements of principles, codes of ethics, codes of conduct and social reporting.⁸ According to Dickerson

...the practical reality today is that some multinational corporations' actual behaviour is more respectful of non shareholder rights than the classic corporate social responsibility norms require. As a matter of conduct, multinationals recognize the rights of persons other than shareholders and a growing appreciation of the power of groups influences this evolving behaviour.⁹

For example Shell Petroleum Development Corporation of Nigeria (Shell)¹⁰ in its 'General Business Principle' recognises five areas of

⁴ Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press 2006) 42.

⁵ Ibid.

⁶ Janet Dine, *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press 2005) 222.

⁷ Claire M Dickerson, 'How Do Norms and Empathy Affect Corporation Law and Corporate Behaviour? Human Rights: The Emerging Norm of Corporate Social Responsibility' (2001-2002) 76 *Tulane Law Review*, 1431

⁸ Doreen McBarnet, 'Corporate Social Responsibility beyond law, through law, for law: the new corporate accountability' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press 2007) 10.

⁹ Ibid. See also Zerk, above n 4.

¹⁰ Shell Petroleum Development Corporation of Nigeria is the subsidiary of the Shell Group in Nigeria

responsibility which include responsibilities to shareholders, customers, employees, business partners and society at large. It further states *inter alia* that it respects the human rights of its employees and that it will:

Conduct business as responsible corporate members of society, comply with applicable laws and regulations, ... support fundamental human rights in line with the legitimate role of business, and ... give proper regard to health, safety, security and the environment.¹¹

Shell has also embarked on several CSR initiatives which include building roads, clinics, schools, providing transport and other initiatives. According to a 2006 advertisement, the company committed over 1 billion Nigerian Naira (about 8 million USD) to community projects in their area of operation as at the date of publication.¹² In Foster and Ball's opinion 'Shell Nigeria act in some ways like a government, spending over \$50 million per year in infrastructure projects, consulting those affected by its activity in order to ensure, if not its popularity, its acceptance'.¹³ In Nigeria, Multinational Corporations (MNCs) have funded numerous projects of roads, clinics, schools, transport and other infrastructure in the communities in their areas of operation, under the guise of CSR. Faced with continued hostility from host communities who feel deprived by the exploitation of their land and environment by MNCs in the Niger Delta area of Nigeria, the MNCs have recently begun meeting among themselves to work out a common strategy to address the concerns of the people of the region.¹⁴ Considering such trends Jackson opined that corporations clearly assume significant non-economic, i.e. political, legal and moral roles as well as economic ones.¹⁵ It has been observed that globalisation has made corporate decisions in respect of CSR subject, to some extent, to pressures from other sources such as home market consumers and complex problems from less developed countries.¹⁶

¹¹ Royal Dutch Shell plc 'Shell General Business Principles' available at <http://www.shell.com/home/Framework?siteId=nigeria>. Last accessed 02/02/07.

¹² 'MOU with EA Neighbouring Communities: Putting the Record Straight' *The Guardian* (Nigeria), 7th June, 2006.

¹³ Nicholas HD Foster and Jane Ball, 'Imperialism and Accountability in Corporate Law: The Limitations of Incorporation as a Regulatory Mechanism' in Sorchia Macleod (ed), *Global Governance and the Quest for Justice: Corporate Governance* (Oxford: Hart Publishing, 2006) 93.

¹⁴ Yakubu Lawal 'Oil Firms Plan Joint Solutions to Niger Delta Problem' *The Guardian Newspaper* (Nigeria) 10th July, 2007.

¹⁵ Kevin T Jackson, 'Global Distributive Justice and the Corporate Duty to Aid' (1993) 12 *Journal of Business Ethics*, 547.

¹⁶ Dickerson, above n 7..

These developments indicate the acceptance of self-imposed and self-defined responsibility by corporations on themselves akin to morality in the case of natural persons. According to Muchlinski, this trend shows that MNCs appears to be rejecting a purely non-social role through the adoption of codes of conduct and the trend appears to indicate an increasing social dimension to the role of MNCs.¹⁷ However as we shall see presently, commentators have debated whether or not it is possible to construct a moral responsibility framework for corporations.

One way in which CSR is interacting with the law is that legal standards are major sources of the non-binding rules that are shaping corporate 'conscience'.¹⁸ Norms of legal character, especially in the areas of international law of human rights, labour and environmental protection, national and supra national legislation is widely used to inform or guide corporate actions and reporting within the sphere of CSR.¹⁹ Business principles of most corporations draw from these instruments. According to Buhmann, the striking feature is that despite the fact that CSR is generally understood as being voluntary and acting beyond legal compliance, many CSR demands from stakeholders and much corporate compliance action appears to be based on assessments of compliance with international law especially human rights and labour law.²⁰ A recent trend which is still embryonic is that some governments are legislating on aspects of CSR especially in the areas of social reporting and directors' duties.²¹ Recently Indonesia has gone further by moving towards a broader legislative framework for CSR.²²

¹⁷ Peter T Muchlinski, 'Human Rights and Multinationals: Is there a problem?' (2001) 77 *International Affairs* 37-38.

¹⁸ Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility?' in Doren McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press 2007) 208.

¹⁹ Karin Buhmann, 'Corporate Social Responsibility: what role for law? Some aspects of law and CSR' (2006) 6 *Corporate Governance* 188- 202

²⁰ Ibid. See also William C Frederick, 'The Moral Authority of Transnational Corporate Codes' 1999 (10) *Journal of Business Ethics* 165-167

²¹ UK, France, Germany, Belgium, Sweden; see Buhmann, above n 19, 7.

²² The most radical legislative intervention so far, happened in Indonesia in July 2007. The Indonesian parliament passed a new company law: the Limited Liability Company Law, 2007 to replace its former company law, the Limited Liability Company Law No.5 of 1995. At the same period, a new investment law was introduced: Investment Law No 25 of 2007. In these new laws the Indonesian government moved to make CSR a mandatory concept for companies. See Limited Liability Company Law, 2007, Articles 1 and 27; Investment Law No. 25, 2007 Article 15(b); N

These developments raise fundamental questions in law: if these developments are construed as the assumption of morality or conscience by corporations, then what role (if any) does the law have to play in this regard? Lawrence Mitchell and Theresa Galbaldon succinctly summarised these questions when they stated:

[t]he issue of corporate social responsibility poses the important question of whether the corporate tin man can itself be expected to behave humanly, that is be morally responsible, or whether its moral compass can only come from those who motivate it – its directors, officers, and employees. This directly poses the question of whether the corporation can have a heart of its own, its own moral and psychological construct, or whether its morality can never be more than that of the individuals who comprise it.²³

In Parker's opinion law should attempt to constitute corporate 'conscience' by getting companies to want to do what they should and not just comply with legal requirements.²⁴

This article contends that CSR as presently construed is largely a construct of moral responsibilities for companies.²⁵ It further contends that there is a relationship between morality and the law and in doing so the article rejects the positivist argument that there is no issue of morality in law because there is no link between law and morality. It argues that morality, which is driven by societal expectation, forms the basis of the corporation's entrance into the existing social contract. It further argues that the modern corporation has acquired the capacity to enter into the existing social contract by virtue of the status the law has afforded to it.

²³ Kiroyan 'Corporate Social Responsibility now Law in Indonesia' The Jakarta Post, 15 July 2007 – www.jakartapost.com. Last accessed 02/08/07. Lawrence E Mitchell and Theresa A Gabaldon, 'If I Only Had a Heart: Or, How Can We Identify a Corporate Morality' (2001-2002) 76 *Tulane Law Review* 1645.

²⁴ Parker above n 18.

²⁵ However, the difference here is that unlike societal moral construct that are determined by the society as a collective, the moral construct in CSR practices are largely determined by the corporations themselves.

The Shortcomings in the Understanding of the Nature of the Corporation by Ethicists and Philosophers and the Problem of Ascribing Morality to the Corporation

It is posited here that the ambiguity that has attended legal theories as to the nature of the corporate person have befuddled attempts by ethicists and philosophers to analyse the relationship between the corporation and morality. The arguments of Wolgast, Ewin, French, Goodpaster and Mathews, and Donaldson will be used to illustrate this point.²⁶

In Wolgast's view the problem with ascribing morality to the corporation is directly linked with the conception of the corporation as an artificial person under the law.²⁷ According to her, the corporation is in the class of artificial persons who act on behalf of stockholders. The concept thus facilitates the use by the same individuals of others' labour and expertise to increase the power and scope of their activities. The dilution created by the fragmentation caused by this arrangement negates the ascription of moral responsibilities as the intention of the principal and agents do not necessarily coincide.²⁸ The basis of her analysis is the legal conception of the corporation as an artificial person which as we shall presently see may not necessarily be the case because the metaphor is just one of the many conflicting legal theories of the corporation.

The artificial person distinction also grounded Ewin's argument when he concluded that:

Because they are *artificial and not "natural" people*, corporations lack the emotional make-up necessary to the possession of virtues and vices. Their moral responsibility is exhausted by their legal personality. Corporations can have rights and duties; they can exercise the rights through their agents, and they can in the same way fulfil their duties. If necessary, they can be forced to fulfil [sic] their duties. The moral personality of a corporation would be at best a Kantian sort of moral personality, one restricted to the issues of requirement, rights, and duties. It could not be the richer moral life of virtues and vices that is lived by the shareholders, the executives, the shop-floor workers,

²⁶ The relevant works of the writers referred to are cited below.

²⁷ See Elizabeth Wolgast *Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations* (Stanford: Stanford University Press 1992).

²⁸ Ibid.

the unemployed and "natural" people in general²⁹
(Emphasis mine).

Ewin was unequivocal that the moral personality of corporations is severely limited and it is exhausted by its legal personality. The consequence of the artificial legal construct of the corporation according to Ewin is that corporations might be logically locked into selfishness, which would leave them with a very limited and unsatisfactory moral personality. According to him:

of course, it might be very imprudent for them to look as though they were entirely selfish and might, with such a poor corporate image, have deleterious effects on their trading performance, but that is not sufficient to defeat the point and solve the problem. All that shows is that an efficient firm would be subtle about its selfishness, considering what promoted its interests in the long run, and would employ a good advertising agency.³⁰

On the basis of his argument he rejected French's differing argument that '...corporations can be full-fledged moral persons and have whatever privileges, rights duties as are in normal course of affairs, accorded to moral persons'.³¹ French's argument stemmed from his belief that if corporations are not full members of the moral society, they 'will avoid the scrutiny and control of moral sanction' and his aim was to subject them to moral sanction.³² He argued that for an entity to be the subject of moral obligation it needs to be an intentional actor and since corporations have internal decision-making structures then they are moral persons as a collective.

French is not alone in his contention; Goodpaster and Mathew in a widely respected article subsequently argued that conscience can reside in corporations since corporations evince both rationality and respect in their goal-setting and decision-making capacities.³³ Goodpaster developed this idea further in 1983 in his article 'The Concept of Corporate Responsibility' where he based his principle of 'moral projection' on an analogy between

²⁹ Robert E Ewin, 'The Moral Status of the Corporation' (1991) 10 *Journal of Business Ethics* 749.

³⁰ Ibid.

³¹ Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press 1984).

³² Ibid ix.

³³ Kenneth Goodpaster, and John Mathews 'Can a Corporation have Conscience?' (1982) *Harvard Business Review* 132.

corporations and persons.³⁴ It is worth noting here that Goodpaster made a fine distinction between the company and the persons that run them. According to him:

The actions and decisions of corporations are not usually a simple function of any single manager's values. Even the chief executive officer of a corporation often must, in his or her leadership role, work indirectly in efforts to guide the large organization toward its goals... The point is that having a conscience in the running of a large corporation does not translate automatically into running a conscientious corporation. The latter requires an 'institutionalization' of certain values, not simply the possession of those values in one part of the organization (even if that part is at the top of the hierarchy).³⁵

He therefore concluded that managing the 'joint force' or the 'personhood' imputed to the corporation by law and generally accepted accounting principles as well as the 'personality' imputed in recent discussions of corporate 'culture' demands a large unit of analysis.³⁶ In his view the law should give enough freedom for companies to exercise moral responsibility.

In contesting Goodpaster's idea, Ranken resorted to the artificiality of the personhood of the corporation to conclude that the analogy of personhood is irrelevant and may be counter-productive by shifting the focus away from individual responsibility.³⁷ Ranken's argument is basically to reduce the corporation to people that run them. I shall argue later on that this is not true in law. The above postulations arose from what it is perceived the law says corporations are. This was also the premise to Donaldson's view that the law seems to imply that corporations are artificial legal persons or 'juristic persons' who are merely creations of the law. In his opinion the juristic personhood failed to establish fully fledged moral agency.³⁸ In consequence of the heavy reliance on the artificial personhood metaphor, Donaldson concluded that the combined weight of such argument suggests that corporations fail to qualify as moral persons. They may be juristic persons, granted legal rights by Courts and legislatures, they may be moral agents of

³⁴ Kenneth E Goodpaster, 'The Concept of Corporate Responsibility' (1983) 2 *Journal of Business Ethics* 1.

³⁵ Ibid 10.

³⁶ Ibid.

³⁷ Nani L Ranken 'Corporations as Persons : Objections to Goodpaster's Principle of Moral Projection' (1987) 6 *Journal of Business Ethics* 633.

³⁸ Thomas Donaldson *Corporations and Morality* (New Jersey: Prentice Hall 1982) 21.

some other kinds but they do not appear to be ‘moral persons’ in any literal sense of the term.³⁹

This narrow presentation of the theory of the legal personality of the corporation leads Donaldson on an untenable path in his quest to establish the moral status of the corporation. According to him it would be better to ask whether some corporations are moral agents and some are not. It would then be better to proceed by specifying the conditions that any corporation would need to satisfy in order to qualify as a moral agent.⁴⁰ Once we have done this, it is then possible to ask whether or not a given corporation satisfies the conditions. Donaldson sets out some criteria for a corporation to become a moral agent but not a moral person.⁴¹ To qualify as a moral agent, a corporation must be able to use moral reason in decision-making, i.e. it must be morally accountable and it must have control over the structure of the decision-making process itself. He further posited that acute bureaucratic problems may deny or interfere with a company’s ability to become a moral agent.

This is absolutely unhelpful as it merely sets different standards for different corporations which are not the case in respect of societal moral standards in given societies. Furthermore, it is questionable whether a company would willingly make itself a moral agent where such a step would put it at a competitive disadvantage. In the opinion of this writer, because of the focus on the narrow artificial construct of the corporation, the moral philosophers’ and ethicists’ attempts to analyse the moral responsibility of the corporation may have been impaired. The next section considers the conception of the corporation from the standpoint of legal theorists.

The Modern Corporation and Legal Theories

To understand the responsibility (including the moral responsibility) of the modern corporation, it is essential to fully understand the concept of the personhood of the corporation from the legal theory perspective.⁴² This is

³⁹ Ibid 23.

⁴⁰ Ibid 29.

⁴¹ Donaldson differentiates between moral agencies of corporations and individuals. According to him ‘The picture of the responsible corporation, in contrast to that of individual, must make reference to structural design, to information flow and retention, to internal and external accountability, and to mechanisms of interpersonal control. Such a corporation also, considered as a unit, must know “more” both practically and theoretically than the responsible individual yet its capacity to control its own behaviour will be less’. Ibid 126-127.

⁴² Wood and Scharffs followed this approach in their 2002 article but reached a different conclusion from this writer. See Stephen G Wood and Brett G

more so because legal theorisation in this regard influences many fields' understanding of the purpose of the corporation and it has also helped in shaping the law.⁴³ In Bainbridge's view echoing, Roberta Romana, corporate law scholarship requires a normative theory of the corporation and its place in policy, in other words 'corporate law scholarship requires a model of the corporation upon which one may make predictions about how corporate actors will behave under a given legal regime and how Courts should rule in particular cases.'⁴⁴ According to Blumberg in his examination of three traditional corporate personality theories in American law:

The three traditional theories have much more than philosophical interest. They have helped shape our law. The view of the corporation as an "artificial person" underlies entity law, the view of corporation with rights and duties separate from those of its shareholders, for ages past the prevailing view of Western jurisprudence... The view of the corporation as an association or aggregate of the individuals composing it played an important role in the late nineteenth century in facilitating the development of the law to broaden and extend constitutional protections to corporations in order to protect economic interests of shareholders ... the corporation as a "real entity", is the view that has dominated corporations law for decades. It is especially evident in the attribution to corporations of constitutional rights similar to those of natural persons in most cases.

The importance of metaphor in this connection was emphasized by Greenfield when he posited that 'Scholars have used metaphors – corporation as person, corporation as creature of state, corporation as property, corporation as contract, corporation as community, to name the most prominent – as justifications for the imposition of, or freedom from, legal and ethical requirements'.⁴⁵ Commenting on the practical implication of such endeavour Mitchell and Galbadon stated that:

Scharffs, 'Applicability of Human Rights Standards to Private Corporations: An American Perspective' 50 [2002] *American Journal of International Law* 531.

⁴³ P I Blumberg, 'The Corporate Personality in American Law: A Summary Review' (1990) 38 *The American Journal of Comparative Law, Supplement. U.S Law in an Era of Democratization* 49.

⁴⁴ Stephen M Bainbridge, 'Competing Concepts of the Corporation (aka Criteria? Just Say No)' (2002) 2 *Berkeley Business Law Journal* 77.

⁴⁵ Kent Greenfield, 'From Metaphor to Reality in Corporate Law' (2001) 2 *Stanford Agora* at 59.

Judgments as to which of these propositions is most nearly correct can make a difference as far as the kinds of duties and roles that should be assigned to corporate actors and the kinds of external constraints (such as employment discrimination and pollution control law) that should be applied to corporate entities. It is entirely possible that we currently regulate corporations and their constituencies as though one model were correct, whereas another one might be more apt. It is also possible, however, that there may be merit to acting as though one model or another is correct even in the face of evidence that it is not.⁴⁶

According to Smith, something important is going on in the persistent and widespread idea of a business entity or “person” that deserves more study and may ultimately be fully explained by academics.⁴⁷ At the heart of such inquiry is the debate about corporate law’s objectives in the light of increasing attention to social costs of the operation of corporations.⁴⁸ As Woods and Scharffs correctly noted, the underlying theory of the corporate person affects the content and scope of the rights and duties that are attributed to corporations.⁴⁹

There are two broad approaches to corporate personhood: entity theory versus the corporation as an aggregate of natural persons. The two broad approaches have related subdivisions. The entity theory is related to the artificial person’s versus natural person’s distinction while the corporation as aggregate theory is related to the contractarian versus communitarian distinction. The next section examines these different theories of the corporation.

Artificial Entity Theory

This is variously referred to as the artificial person, fiction, concession or grant doctrine of the corporation. The notion is the foundation of the classic definition of corporation given by Chief Justice Marshall in the *Dartmouth College* case:

A corporation is an artificial being, intangible, and existing only in the contemplation of law. Being the

⁴⁶ Mitchell and Gabaldon, above n 23.

⁴⁷ Thomas A Smith, ‘The Use and Abuse of Corporate Personality’ (2001) 2 *Stanford Agora* 69.

⁴⁸ See David Millon, ‘The Ambiguous Significance of Corporate Personhood’ (2001) 2 *Stanford Agora* 39; David Millon ‘Theories of the Corporation’ (1990) *Duke Law Journal* 201.

⁴⁹ Woods and Scharffs, above n 42, 544.

mere creation of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.⁵⁰

This theory, which has been very popular with the Courts, has considerably influenced other disciplines to conceive the corporation as an artificial 'person'. According to this early version of the entity theory the corporation was a separate person in the eyes of the law. However the emphasis was on the personhood's artificiality which was based on the fact that its existence depended on action by the State.⁵¹ The rationale for this is not far-fetched as up to the 19th century private initiative alone was not enough in creating a corporation; entrepreneurs required special acts of the legislature granting a charter to operate.⁵² The legislature imposed limits on the corporation through the charters and the ultra vires doctrine confined the company to those bounds. Some notable American cases decided from this stand-point in the nineteenth century include *Louisville, Cincinnati & Charleston Railroad V. Leston*,⁵³ *Marshall v. Baltimore & Ohio R.R.*⁵⁴ and *Bank of Augustat v Earle*.⁵⁵ The argument of Donaldson, Ewin and Wolgast (discussed earlier) proceeded from this particular viewpoint which is submitted is an incomplete understanding of the legal conception of corporate personhood.

Corporation as an Aggregate of Natural Persons

This is also known as the association, aggregate or contract theory. The advent of large-scale enterprises led to a shift in the legal conception of the corporation. The artificial entity theory because of its justification of State regulation was found to be incompatible to the emerging economic structuring of large corporations. Recourse was had to the aggregate theory which appeals to the individual rights of shareholders and the freedom of association to justify the position that legislative interference was not needed. As Millon correctly pointed out, the corporation is perceived as the aggregation of natural persons that made it up in the sense of a partnership. It is therefore not an entity independent or distinct from its members.⁵⁶ Such reasoning supports the viewing of the company from the perspective of the persons that constitute it. Thus whatever is done to the corporation is done to the individuals

⁵⁰ *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

⁵¹ Million (2001), above n 48, 201.

⁵² *Ibid.*

⁵³ 43 US (2 How.) 497 1844.

⁵⁴ 57 US (16 How.) 314, 327-29(1853).

⁵⁵ 38 US (13 Pet.) 519 (1839).

⁵⁶ Million (2001) above n 48, 39.

constituting it.⁵⁷ The point here is that corporations are not persons at all (artificial or otherwise) and should not be subject to any special duties. Any regulation of the corporation has to be justified with respect to the individuals that own the corporation and their property and not an indeterminable concept of corporation.⁵⁸ This notion was reflected in notable 19th Century US decisions such as *Bank of the United States v. Deveaux*⁵⁹ where Chief Justice Marshall writing the unanimous decision of the Court, held that in determining the diversity of jurisdiction for the purpose of the jurisdictional competence of the Federal High Court the case was controlled by the citizenship of the shareholders of the company and not an abstract concept.

The dependence of the concept mainly on the analogy made between corporations and partnership presented a problem of its own.⁶⁰ According to Millon ‘...partnership law’s traditional insistence on each partner’s right to participate in control of the business implied that unanimous shareholder approval was necessary for corporate mergers and consolidations. Furthermore, the partnership analogy also suggested the possibility of shareholder liability in cases of firm insolvency’.⁶¹ Thus the analogy placed some difficulty in corporate decision making and also allowed the possibility of individual shareholder liability. These difficulties later influenced the emergence of the natural entity theory which would have ironic consequences for corporate law theory.

Natural Entity Theory

Natural entity theory is also referred to as the person, real entity or realism theory. This is one important development in the late 19th and 20th century most of the commentators from other fields failed to pay much attention. The natural entity theory conceives the corporation neither as a legal fiction nor a contract between individuals, but a natural person with a pre-legal existence.⁶² The theory derives substantially from Otto Gierke’s idea of naturalness embedded in groups, and later work in the same vein by Maitland and Freund.⁶³ It is also associated with the continental theorists of the 20th

⁵⁷ For example the US Supreme Court held in *Santa Clara v Southern Pacific Railway* 118, U.S 394 (1886) that attempts to tax corporation directly implicated individual constitutional rights.

⁵⁸ Smith above n 47, 69.

⁵⁹ 9 US (5 Ranch) 61 (1809.)

⁶⁰ Million (2001) above n 48, 5.

⁶¹ Ibid.

⁶² Anna Grear ‘Human Rights –Human Bodies? Some Reflections on Corporate Human Rights Distortion, The Legal Subject, Embodiment and Human Rights Theory’ (2006) 17 *Law Critique* 171-199, 185.

⁶³ Otto Gierke, *Political Theories of the Middle Age* (Translated by Frederic W. Maitland) (Cambridge: Cambridge University Press 1990); Ernst Freund,

century who wrote about ‘group’ or ‘corporate’ personality as a challenge to individualism and an effort to come to terms with institutions of modern society.⁶⁴ In so classifying a corporation, it illegitimatises any attempt to single out corporations for special regulatory control. It thus justified the banishment of the State’s role in the creation of companies to a secondary level while emphasising the natural evolvement of corporations from the ‘impersonal market forces’.⁶⁵ This theory fits well with the emergence of large corporations as it deemphasised the role of the shareholders in the control of the companies’ affairs, transferring effective power to the board who acts for the corporate entity.⁶⁶ The status of companies as distinguishable from shareholders was thus recognised by legal theorists.⁶⁷ According to Cerri, the legal status of *person* has contributed to making corporations autonomous from public control and to shield their accountability while retaining correlative privileges.⁶⁸ The significance of this development is that the minimisation of the State’s role in the incorporation process in favour of the view that the corporation is the product of private initiative and inevitable market forces discouraged legal regulations that especially applied to corporations and increased accommodation of the separation of ownership from control and the focus on managers accountability to shareholders.⁶⁹ One result of this conception is the ability of corporations to claim rights provided primarily for natural persons.⁷⁰

These developments however led to another possibility spearheaded by Dodd who, arguing from the entity perspective, and emphasising the separateness of the corporation from its shareholders, called for a wider social responsibility for business. According to Dodd:

The Legal Nature of Corporations (University of Chicago Press, 1897); Frederic Maitland ‘The Corporation Sole’ (1900) 16 *Law Quarterly Review* 335; J. A Mack, ‘Group Personality—A Footnote to Maitland’ (1952) 2 *The Philosophical Quarterly* 249-252

⁶⁴ Carl J Meyer, ‘Personalizing the Impersonal: Corporations and the Bill of Rights’ (1989-1990) 41 *Hastings Law Journal* 581; John Dewey, ‘The Historical Background of Corporate Legal Personality’ (1926) 35 *Yale Law Journal* 655; Paul Vinogradoff, ‘Juridical Persons’ (1924) 24 *Columbia Law Review* 594.

⁶⁵ Million (2001) above n 48, 39.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Luigi Cerri, ‘Corporate Personhood and Economic Democracy’ Paper presented at a workshop on Economic Democracy and European Left in the Age of Globalization organized by Centre for Marxist Studies (CSM) and Transform (European Network for Alternative Thinking and Political Dialogue 14th-15th June 2003, Stockholm).

⁶⁹ *Ibid.*

⁷⁰ Blumberg *above n 43*, 49; Meyer, *above n 64*, 577.

If we think of it as an institution which differs in the nature of things from the individuals who compose it, we may then readily *conceive of it as a person*, which, like other persons engaged in business, is affected not only by the laws which regulate business but also by the attitude of public and business opinion as to the social obligations of business.⁷¹ (Emphasis mine)

The idea is compelling because if corporations are viewed as natural persons in some sense and accorded the negative right to freedom from coercion, then corporations should also have obligations just like humans.

Berle and Means' response to Dodd's article did not directly take on the issue of the personhood of the corporation. Rather they rehashed the property rights argument (corporations as aggregate of natural persons) in a depersonalised manner.⁷² They asserted that the corporation is simply a property owned by shareholders and run by management as trustees. This idea was the foundation for Friedman's positions that the corporation is the property of shareholders and the management are employees of shareholders.⁷³ The corporation is thus a mere legal fiction for the use of shareholders and from this perspective, the argument of the personhood of the corporate entity is irrelevant. According to Friedman:

What does it mean to say that 'business' has responsibilities? Only people can have responsibilities.⁷⁴

The corporate person was thus reduced to the shareholders and their agents. At this juncture, it would be pertinent to consider two modern theories that have developed from earlier ideas and have been prominent in the discourse in recent times: the contractarian and the communitarian theories.⁷⁵

Contractarian versus Communitarian Debate

⁷¹ E Merrick Dodd, Jr., 'For Whom are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* 1145.

⁷² Adolph A Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Commerce Clearing House 1932).

⁷³ Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' in W Michael Hoffman and Robert E Frederick (eds), *Business Ethics, Readings and Cases in Corporate Morality* (New York: McGraw Hill 1995) 133.

⁷⁴ Ibid.

⁷⁵ Irene Lynch Fannon, *Working within Two Kinds of Capitalism: Corporate Governance and Employee Stakeholding: US and EU perspectives* (Oxford-Portland, Oregon: Hart Publishing 2003) 77-78.

The contractarian ‘nexus of contract’ idea proceeded from the standpoint of Berle and Means⁷⁶ deemphasising the personality of the corporation. Any notion of ‘corporate responsibility’ or ‘citizenship’ is denied.⁷⁷ The contractarian school is based on the law and economics contract theory, which sees the corporation as a microcosm of the larger market place.⁷⁸ The school has its foundation in the liberal-utilitarian model of Hobbes, Locke, Smith, Bentham and Mill⁷⁹ which emphasises the primacy of the law protecting rights and enforcing contracts. The theory conceives the company as a vehicle for contracting in which each constituency is placed within a contractual paradigm that only recognises bargained rights.⁸⁰ According to the theory the sole purpose of the corporation is to maximise shareholders’ profit. All other constituencies within the corporation are protected to the extent of the provisions of the term of their contracts. To the contractarian school, the role of the State in corporate governance is ‘primarily to provide efficient default rules from which shareholders can choose to depart, and the few mandatory legal rules that do exist to restrain corporate behaviour are subject to evasion by choice of form’.⁸¹ Markets thus, to a large extent, set the terms of corporate activity, not the law.⁸² The role of the law is therefore nothing more than to provide a set of loose contractual based rules to assist a collection of individuals in pursuing their interests in a free market.⁸³ According to Fischel, a prominent proponent of this school of thought:

Since it is a legal fiction, a corporation is incapable of having social or moral obligations, much in the same way that inanimate objects are incapable of having these obligations. Only people can have moral obligations or social responsibility.⁸⁴

The response of the communitarian school which presents a contrasting position to the contractarian school also side stepped the argument as to the personhood of the corporation. The corporation is viewed by the communitarian school as a community of participant in which such values as

⁷⁶ Berle and Means, above n 72.

⁷⁷ Million (2001), above n 48.

⁷⁸ Lynch Fannon, above n 75, 80.

⁷⁹ Ibid at 79.

⁸⁰ Ibid at 77.

⁸¹ Adam Winkler, ‘Case studies in conservative and progressive legal orders: corporate law or the law of business? Stakeholders and corporate governance at the end of history’ (2004) 67 *Law & Contemporary Problems* 109.

⁸² Ibid. See also Lawrence Mitchell, *Corporate Irresponsibility: America’s Newest Export* (New Haven & London: Yale University Press 2001) 13.

⁸³ Mitchell, above n 82.

⁸⁴ Daniel R Fischel, ‘The Corporate Governance Movement’ (1982) 35 *Vanderbilt Law Review* 1259.

trust and respect for others determine the success of the 'venture'. Though the purpose of the corporation has not been fully defined by this school, as in the case of the contractarian school, it introduces a new conception of the corporation through recognition of the claims of other stakeholders. The model seeks to 'regulate and define the legal institution of property and contract in service of social values'.⁸⁵ According to Parkinson⁸⁶ the idea behind this model is that the company is a complex social institution, which cannot be adequately conceptualised through the contractarian view or the concept of ownership. The model seeks to apply values, which are usually applied to non-commercial, social and political organisations in evaluating the governance of firms and in reforming the conception of the firm.⁸⁷

The contractarian versus communitarian debates have driven the legal discourse on the purpose and nature of the corporation in recent years. According to Millon today's version of the debate over the desirability of shareholder primacy largely is conducted without regard to entity-based arguments over corporate personhood. The contractarians and communitarians focus on the insiders, and corporate law therefore looks inward, at the relations among corporation's various participants.⁸⁸

Millon has suggested that perhaps the real challenge is to discard both entity- and aggregate-based arguments for responsibility and turn attention instead to the individual actors and the question of their responsibility, without regard to anyone's status in relation to a corporation.⁸⁹ It is argued however that the suggestion is weak as it simply tries to wish away the legal theorisation about the company without taking into account the far reaching impact legal theory has had on the conception of the corporation both within and outside the law. In addition, as Bainbridge observed in another context, one must have a positive and normatively viable conception of the entity being considered in order to be able to give specific evaluative criteria among others in analysing the role of such an entity.⁹⁰

⁸⁵ Irene Lynch Fannon, 'The European Model of Corporate Governance: Prospects for Success in an Enlarged Europe' in Paul Ali and Greg Gregoriou (eds) *International Corporate Governance after Sarbanes-Oxley* (New Jersey: John Wiley & Sons 2006) 423-443.

⁸⁶ John Parkinson 'Models of the Company and the Employment Relationship' (2003) 41 *British Journal of Industrial Relations* 481.

⁸⁷ Ibid.

⁸⁸ Millon (2001), above n 48.

⁸⁹ Ibid.

⁹⁰ Bainbridge, above n44, 77.

How are Corporations conceived of today?

After a thorough examination of the major theoretical conceptions of the corporation, Mitchell and Gabaldon considered which of the metaphors reflect more accurately the way corporations are treated today. Regarding the corporation as aggregate of natural persons model, they argued that save with the exception of laws relating to basic corporate liability for torts and crimes and some regulatory regimes such as the antitrust and securities regulation (which allows for corporate actors to be individually punished for unlawful conducts undertaken on behalf of corporations), the corporate entity is usually held accountable in most cases implicating torts, crimes and statutory violations.

On the concept of the corporation as a person they concluded that:

We think that for much of the twentieth century and the twenty first, corporations pretty much have been regulated primarily according to the “corporations as individual, presumably, if not hopefully, with its own morality” model...For example, the laws pursuant to which corporations are animated bestow upon them the same legal powers as individuals, and corporations are included, in the definition of the “persons” that can violate criminal laws. Whatever contemplation of morality inheres in criminal law, then, evidently does not discriminate between real people and corporations. Special accommodation of the corporation’s fictional nature, as well as its sometimes extraordinary resources, sometimes is forced.⁹¹

This paper supports the conclusion of Mitchell and Galbaldon and would proceed to argue that based on this view the corporation has become an entrant into the social contract and should stand in the same position as individuals *vis-à-vis* international human right norms.

The Autonomy of the Corporation

The position arrived at above recognises the autonomy of the corporation as a distinct ‘person’ but contradicts Dan-Cohen’s ‘personless corporation’ which he described as an ‘intelligent machine’.⁹² It would be

⁹¹ Mitchell and Gabaldon, above n 23. The conclusion of Mitchell and Gabaldon, in the view of this writer, is more representative of actual developments in this area of the law than the conclusions of Wood and Scharrrffs, above n 42.

⁹² Mier Dan-Cohen, *Rights, Persons, and Organizations* (Berkeley: University of California Press 1986) 49. Dan-Cohen constructed a hypothetical

unrealistic to think of a corporation without human instrumentality. However, the very fact that the corporation acts through humans does not affect its separate identity. In the human world, children, lunatics and people in persistent vegetative state are still humans with distinct personality despite the fact they need to act through others. The point that is being made, and will be elucidated upon later in this paper, is that the rights that are ascribable to the corporate entity as distinct from its shareholders and management have increased because of its acquisition of an autonomous identity.

Each human person that participates in the corporation, whether as shareholders or management or employees, cedes certain amounts of their autonomy as humans to the corporation. The shareholders give up the right to control their properties, employees their labour and management their services and how it is used. They are thus only participants in the larger autonomy of the corporation. The autonomy is different from that of individual participants because its exercise is distinct from that of the participants and is exercisable only in the name of the company. For example, under the company law of most jurisdictions, the directors who exercise the autonomy of the corporation have fiduciary duties to the company.

Analysing the company from this perspective is not new. However, this perspective has been neglected in the discourse.⁹³ The concept of the 'enterprise-in-itself' which expressed the enterprise's autonomy as a social system and an economic power distinct from either managers or employees has been canvassed by German scholars in the past.⁹⁴ In more recent times, Teubner has engaged with this illuminating concept in his consideration of the expression 'company's interest' in company law. Teubner posited that, to speak of the company's interest is not the same thing as the interest of shareholders or employees but the interest of the enterprise 'in itself'. According to him:

People and things are transferred into the enterprise's environment and the enterprise is constructed in radical fashion exclusively as an ensemble of

corporation which repurchased its own shares, sacked all its human personnel and replaced them with computers. He concluded that this possibility demonstrates that corporations are merely mechanical and not human and so they have no capacity to bear rights. This however flies in the face of reality as would be shown in this paper. Corporations have the capacity to bear rights and they have rights ascribed to them independent of their human participants.

⁹³ G Teubner, 'Company Interest: The Public Interest of the Enterprise 'in Itself' Ralf Rogowski and Ton Wilthagen (eds), *Reflexive Labour law: Studies in Industrial Relations and Employment Regulation* (Deventer and Boston: Kluwer Law and Taxation Publishers 1994) at 22

⁹⁴ *Ibid* 20.

communications. That is why the term 'enterprise-in-itself' seems appropriate, underlining the self-reference and autonomy of the organization.⁹⁵

He argued that the ensemble is 'effectively separated from acting individuals, whether shareholders, workers or management'.⁹⁶ He further argued that because the modern corporation has gained a far-reaching autonomy from shareholders and management it has a wider role in the larger society.⁹⁷ He wrote:

The company interest cannot be identified with the interest of the shareholders. Moreover, it is different from the interests of the interest-groups involved. None of the resource-holders, whether shareholders, workers, or management, are the 'subject' of the company interest. It is the 'corporate actor' itself, that is to say the autonomous ensemble of communications in its orientation towards broader social expectations. At the same time this rules out the overall economic system and the political system as subjects of this interest.⁹⁸

It is noted that Teubner's analysis goes against the long established definition of 'company's interest' which equates the expression with the interest of shareholders.⁹⁹ However, by emphasising the autonomous nature of the modern corporation, Teubner's analysis is closer to reality than the traditional view. For example, when Dine considered the question who owns the assets of the company, she argued that the company should be seen as the true owner. According to her:

We should understand the company as truly owner of its assets with the managers exercising its ownership rights, at present uncontrolled since the claim to control by shareholders is seen to be an unfounded use of property rhetoric.¹⁰⁰

Thus, she underscores the distinct autonomy of the corporation. In the same vein Teubner observed elsewhere '... the historical liberation of the legal person and the emergence of the joint stock company as the typical large-scale

⁹⁵ *Ibid* 25.

⁹⁶ *Ibid* 26.

⁹⁷ *Ibid* 26.

⁹⁸ *Ibid* 27.

⁹⁹ For a discussion of the traditional view see David J Bakibinga, 'Directors' Duty to Act Bona Fide in the Interest of the Company' (1990) 39 (2) *The International and Comparative Law Quarterly* 451.

¹⁰⁰ Dine above n 6, 263-264.

organisation... was concerned with the autonomy of the corporation vis-à-vis its environment and shareholders'.¹⁰¹

Thus, it is submitted that the modern corporation has gradually assumed a life of its own with distinct interests, different from that of shareholders and management. The implication of this autonomy is discussed in the following sections of this paper.

A Re-Examination of the Social Contract as Justification for CSR

The dominance of the social contract in political theorisation has led to interest in analysing the role of business in society from the perspective of a social contract. The social contract concept was developed by philosophers of the 17th and 18th century including Thomas Hobbes, John Locke and Jean-Jacques Rousseau. It is important to note as a starting point, that the idea predates the 19th century modern joint stock, limited liability corporations by about 200 years. The social contract is an implied agreement by which people agreed to create government and maintain social order. It provides the rationale behind western democracies ideology that the legitimate State authority must be derived from the consent of the governed. The view, from the context of this paper, is that an implicit social agreement also exists between business and society. It is to this implicit agreement that we can look to identify the duties and rights of business *vis-à-vis* the society. The contract is considered to be an evolving document. Perhaps one important contribution of Donaldson in this connection is his attempt to analyse the social contract between corporation and society.¹⁰² According to him the political social contract provides a clue for understanding the contract for business: if the political contract serves as a justification for the existence of the State, then the business contract by parity of reasoning should serve as justification for the existence of the corporation.

The Social Contract: Donaldson's Approach

In the *Theory of Justice* Rawls included corporations (as well as States and churches) along with individuals when he listed the parties in the 'original position'.¹⁰³ However he accorded priority to individuals in the social contract and he did not explore in detail the corporation's status within the scheme.

¹⁰¹ Gunther Teubner, 'Unitas Multiplex: Corporate Governance as an Example' in Gunther Teubner, *Law as an Autopoietic System* (1993, Oxford, Blackwell) 146.

¹⁰² Donaldson, above n 38.

¹⁰³ John Rawls, *A Theory of Justice* (Revised Edition) (Cambridge, Massachusetts: Harvard University Press 1971, 1999) 126.

Donaldson resorted to the social contract theory in order to interpret the nature of the corporation's indirect obligations which according to him are notoriously slippery.¹⁰⁴ What he considered indirect obligations straddles the areas covered by CSR. However in addressing the issue he relied on his idea of what the law says a corporation is, which as this paper has shown earlier, is not the case.

Donaldson drew a parallel analogy to traditional device in social contract theory and suggested looking at the state of nature which he called for his purpose 'state of individual production', that is, the state of affairs existing before the introduction of productive organisations. In the state of individual production, there would exist 'economically interested persons who have not yet organized themselves or been organised into productive organizations'.¹⁰⁵ The strategy according to him involves:

1. Characterising conditions in a state of individual production (without productive organisation).
2. Indicating how certain problems are remedied by the introduction of productive organisations.
3. Using the reasons generated in the second step as a basis for specifying a social contract between society and its productive organisations.

According to him, two principal classes of people stand to benefit or be harmed by the introduction of productive organisations: the consumers and the employees (i.e. society as consumers and employees).¹⁰⁶ It is however argued that narrowing down society to consumer and employees in analysing the social contract would impair Donaldson's attempt as it would be difficult to account for all the ramifications of the externalities of corporation from that perspective. Host communities for example are as much affected by companies operations as consumers and employees.

What are the terms of the contracts? Donaldson enumerated three broadly.¹⁰⁷ According to him people as consumers would hope that the introduction of productive organisations would better satisfy their interests for shelter, food, entertainment, transportation, health care, and clothing. There is therefore a promise from the standpoint of the corporation to 'enhance the

¹⁰⁴ Donaldson above n 38, 36.

¹⁰⁵ Ibid 44-45.

¹⁰⁶ Note that in Donaldson's reply to Hodapp's criticisms of his attempt he argued that these two classes are broadly defined and before the hypothetical contract they are "prospective classes". See Thomas Donaldson, 'Social Contracts and the Corporations: A Reply to Hodapp' 1989 (8) *Journal of Business Ethics* 133.

¹⁰⁷ Donaldson, above n 38, 45.

satisfaction of economic interests'.¹⁰⁸ Secondly people as workers would also expect to increase income potentials, diffuse personal liability and the adjustment of personal income allocation in a way that avoids the vicissitudes of life. However, the contract recognises that there are major drawbacks to the introduction of productive organisations just as there were drawbacks in the political social contract (governments' tendencies to abuse its power). He noted that potential harms to customers include pollution, depletion of natural resources, destruction of personal accountability and misuse of power. In the case of employees the harms include the alienation of workers, restriction of workers control over working conditions and the dehumanisation of the worker. Thus he posited that the social contract will specify that these negative consequences be minimised while the positive benefits are maximized. According to him as part of such a social contract from the standpoint of consumers, productive organizations should minimise:

1. Pollution and depletion of natural resources
2. Destruction of personal accountability
3. The misuse of political power

And from the perspective of the worker; corporations should minimize:

1. Worker alienation
2. Lack of workers' control over working conditions
3. Monotony and the dehumanisation of the worker

Hence, the social contract according to Donaldson requires that productive organisations maximise evils relative to consumers and workers welfare. The question would then be how corporations make the necessary trade-offs. According to Donaldson society might believe that on balance, people as workers stand to lose from the introduction of productive organisations, and that potential alienation, loss of control, and other drawbacks make the overall condition of the worker worse than before. But if the benefit to people as consumers fully overshadowed these drawbacks, the contract would still be expected to be enacted.

However, he placed an important caveat: people make trade-offs only on the condition that it does not violate minimum standard of justice for example reducing a given class of people to inhuman existence, subsistence poverty or enslavement.¹⁰⁹ He thus posited that an inference could be drawn that a tenet of the social contract will be that productive organisations are to remain within the bounds of the general canons of justice. Recognising the limitation in deciding what justice requires, he opined that the application of the concept of justice to productive organisations appears to imply that

¹⁰⁸ Ibid.

¹⁰⁹ Ibid 53.

productive organisations avoid deception or fraud, that they show respect for their workers as human beings, and that they avoid any practice that systematically worsens the situation of a given group in society.

Criticisms of Donaldson's Analysis

There have been many criticisms of Donaldson's analysis.¹¹⁰ I consider Hodapp's criticism here because of his direct attack on the social contract theory. Donaldson has responded to Hodapp's criticisms¹¹¹ but I will consider the issues he raised from a legal point of view. Hodapp criticised Donaldson's social contract theory as a methodology which is circular, presupposing the information which it is supposed to generate. He argued that Donaldson had already assumed the purpose of the corporation before engaging in the imaginative process. He contended that unlike the threat (which Hobbes described) which may constrain those who might not wish to enter the social contract (remaining in a state of nature with no protection under the social contract) no such threat can be found in respect of productive organisations because of the rights of individuals who set them up. Individuals who create productive organisations have natural rights which are attributable to the productive organisations and other people in the society may not brazenly override these rights based on their consumptive and employment rights. According to him:

the conflict is not between an abstract entity without any natural rights and the rest of us who possesses consumptive and employment rights; rather the conflict is between individuals with productive rights who have created productive organizations and the rest of us who have consumptive and employment rights.¹¹²

He concluded that the business of business should be business. Then he reached an unsupportable conclusion in respect of the political contract and the corporation when he said 'The Corporation is only an agent for the State and has no authority to make such contracts on its own behalf. It can only make such contracts on behalf of its principal, the state'.¹¹³

Hodapp's assertion here can only be valid if the corporation can be completely equated with the individuals who set them up. This is not true as

¹¹⁰ See for examples Paul F Hodapp, 'Can There be a Social Contract with Business?' (1996) 9 *Journal of Business Ethics* 127; Gordon C Sollars, 'The Corporation as Actual Agreements' (2002) 12 *Business Quarterly* 351.

¹¹¹ Donaldson, above n 106, 133.

¹¹² Ibid.

¹¹³ Ibid.

the corporation is not equated with its shareholders.¹¹⁴ It has ‘its own interest’ and a threat exists as to whether society will continue to allow it to exist in the form in which it presently takes. Furthermore his conclusion that the business of business is business will not stand up in the light of recent developments and business approaches to other stakeholder issues.¹¹⁵ As to his conclusion that the corporation is an agent of the State, it is hard to imagine the modern corporation as an agent of the State. While the interest of the modern corporations and governments sometimes coincides, they do not always coincide. His criticisms are based on one of the possible interpretation of the nature of the corporation ‘corporation as individual private property right’.

The Social Contract, Morality and Corporations: A Different Approach

In a widely cited recent article, Wilson posited that:

Corporations operate under the terms of two charters: a former written, legal charter; and an unwritten, but critically important, social charter...It is the unwritten charter of societal expectations that determines the values to which the corporation must adhere and sets the terms under which the public grants legitimacy to the corporation.¹¹⁶

Wilson contended that as business organisations become the principal form of economic organisation, the number of interested parties multiplied, the relationships become more complex and the interest of more and more constituencies are involved. According to him:

This expansion of constituencies and interests has progressively enlarged the social role and importance of the corporation, broadened its responsibilities, and underscored the fact that it must reflect the society’s shared values – social, moral, political, and legal as well as economic. Building the corporation on a foundation of economic values alone has never been a satisfying solution, either for its members or society. Now it is not even a viable option.

¹¹⁴ Dine, above n 6, 45.

¹¹⁵ The contention that the corporation has only one goal, which is to maximise shareholder’s profit is fading fast in the face of widespread practice of CSR.

¹¹⁶ Ian Wilson, *The New Rules of Corporate Conduct: Rewriting the Social Charter* (Westport, Connecticut: Quorum Books 2000) 3.

He thus posited that new rules are emerging from societal expectations (as demonstrated by the changing practices of companies' *vis-à-vis* CSR) which corporations would have to contend with later.¹¹⁷ According to Dine the expectation referred to by Wilson can only be found by developing jurisprudence which refines and makes precise the vague aspirational goals which is currently presented in CSR debates.¹¹⁸

I argue in this paper that drawing from legal theorists' discourse on the nature of the corporation and emerging jurisprudence (discussed below) the corporation has moved from being just an artificial person, to something similar to a natural person. This change should inform the understanding of the role of the corporation under the social contract. It is contended by this writer that the existence of the political social contract before the introduction of productive organisations or corporations has a bearing on any analysis of the social responsibility of business. The corporations entered the scene at a later stage and would thus negotiate a contract based on the existing political social contract. A distinction must be made between the earlier chartered corporation and the modern incorporated companies. This is important because persons or entities who are parties to the contract are expected to be independent, rational and equal participants.¹¹⁹

The requirement of independence, rationality and equality would imply that the earlier chartered corporations, which were completely subject to State control, cannot reasonably be argued to have been a party to the social contract. This is mainly because of their lack of independence and the unequal status attached to them by virtue of the manner of their creation and the constraint placed on their operation by the State. The chartered corporations were simply instruments in the hand of the society. It is this kind of corporation that could probably come within Hodapp's analysis. One of the shortcomings of Donaldson's attempt is his failure to recognise this distinction.

However the transition from chartered corporation to the incorporated modern company changed the complexion of the corporate form and its relationship with society. As argued earlier, the corporation gradually assumed a life of its own in law and in fact. It became distinct from shareholders and has an interest different from shareholders and management. It has autonomous status with important consequences in law. According to Cerri,

¹¹⁷ Ibid 33-137.

¹¹⁸ Dine, above n 6 234.

¹¹⁹ Martha C Nussbaum, 'Beyond the Social Contract: Toward Global Justice' The Tanner Lectures on Human Values delivered at Australian National University, Canberra, November 12 and 13, 2002 and at Clare Hall, University of Cambridge, March 5 and 6, 2003.

the most striking consequence of corporate personhood is the use of constitutional amendment by American business corporations.¹²⁰ This has led to the Courts treating the corporate form as an individual, a kind of person that can enjoy rights attributable to humans.¹²¹

A significant development in the US for example was in *Santa Clara County v Southern Pacific Railroad Company*¹²² where a private company was held to be a natural person under the US Constitution and to have the right to be protected under the 14th Amendment.¹²³ Several judgments have followed this trend in the US. According to the Supreme Court in that case, refusing to take argument on the personhood of the corporation:

The court does not wish to hear [oral] argument on the question whether the provision of the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the law, applies to corporations. We are all of the opinion it does.

The decision in *Pembina Consolidated Silver Mining and Milling Co. v Pennsylvania*¹²⁴ without saying explicitly that corporations are persons took the same approach. According to the Court ‘[u]nder the designation of person [in the Amendment] there is no doubt that a private corporation is included.’

The US Court finally equated the corporation to a person in *Covington & Lexington Turnpike Road Co. v Sandford*.¹²⁵ The Court relied on *Santa Clara* and *Pembina* among other cases. According to the Court ‘corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of laws, as well as denial of the equal protection of the laws’.

Furthermore, the 5th Amendment of the US Constitution which provides that ‘nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb...’ which directly refers to natural person with the use

¹²⁰ Cerri, above n 68.

¹²¹ Paul Blumberg, ‘The Multinational Challenge to Corporate Law’ (Oxford: Oxford University Press 1993) 30-45; Mayer, above n 64, 577; See also J D Ohlins ‘Is the Concept of the Person Necessary for Human Rights?’ (2005) 105 *Columbia Law Review* at 226-227.

¹²² 118 U.S. 394 (1886).

¹²³ According to Mayer 1886 marked the year when the corporation was personified in the US. See Mayer above n 64.

¹²⁴ 125 US 181 (1888).

¹²⁵ 164 U.S. 578, 592 (1896).

of 'life or limb' have been made applicable to corporations by the Court.¹²⁶ The US Courts have also held that the 1st Amendment on freedom of speech is applicable to corporations.¹²⁷ In other cases the Courts have ruled that the corporations are entitled to 4th Amendment 'search and seizure' protection,¹²⁸ freedom of speech,¹²⁹ right to influence political elections or referenda through money spending,¹³⁰ right to protection of commercial speech¹³¹ and right to privacy.¹³²

Commenting on these developments Mayer wrote

[t]oo frequently the extension of corporate constitutional rights is a zero-sum game that diminishes the rights and powers of real individuals.... The legal system thus is creating unaccountable Frankensteins that have superhuman powers but are nonetheless constitutionally shielded from much actual and potential law enforcement as well as accountability to real persons such as workers, consumers, and taxpayers.¹³³

¹²⁶ Blumberg, above n 43, 59 ; See also *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *American Tobacco Co. v United States*, 328 U.S. 781 (1946); *United States v. Security National Bank*, 546 F. 2d 492 (2d Cir. 1970).

¹²⁷ *First National Bank v Bellotti* 435 US 765 (1978).

¹²⁸ *Hale v Henkel* 201 US 43 (1906).

¹²⁹ *Buckley v Valeo* 424 US 1 (1976); *First National Bank v Bellotti* 435 US 765 (1978); *Austin v Michigan Chamber of Commerce* 494 US 652 (1990).

¹³⁰ *Central Hudson Gas and Electric Company v Public Utilities Commission* 447 US 557 (1980).

¹³¹ *Pacific Gas and Electric Corporation v. Public Utilities Commission* 475 US 1 (1986); *International Dairy Foods Association v Amestoy* 92 F.3d 67 (1996).

¹³² *See v City of Seattle* 387 US 541 (1967); *Marshall v Barlow's Inc* 436 US 307 (1978).

¹³³ Mayer, above n 64, 658-659; William Greider, in the same vein said 'In the modern era of regulation [corporate lawyers] are invoking the Bill of Rights to protect their organizations from federal laws...Corporations in other words, claim to be "citizens" of the Republic, not simply for propaganda or good public relations, but in the actual legal sense of claiming constitutional rights and protections... Whatever legal theories may eventually develop around this question, the political implications are profound. If corporations are citizens, then other citizens—the living, breathing kind —necessarily become less important to the process of self-government', Quoted in Robert A.G Monks and Neil Minnow, *Corporate Governance* (2nd ed, Malden: Blackwell Publishing, 2001) 13.

The jurisprudence of the European Court of Human Rights (ECtHR) in this regard is also interesting to note. While the ECtHR has not concerned itself much with the question of the personhood of the corporation it has made important pronouncements which implicate the status of the corporation in the interpretation of the provisions of the European Convention on Human Rights (ECHR).¹³⁴

The ECHR offers wide ranging 'human right' protection for business entities despite the fact that these entities are not humans.¹³⁵ According to Emberland the term 'everyone', which appears frequently in the Convention provisions, can crucially also be applied to corporate entities'.¹³⁶ The ECtHR has held that corporations possess the right to property in Article 1 Protocol 1, the right to free speech in Article 10, the right to fair hearing in Article 6 and the right to privacy in Article 8.¹³⁷ For examples, the European Court has also allowed corporations to enjoy the right provided under Article 8 (1) which provides that 'everyone has the right to respect for his private and family life, his home and his correspondence'. The Court held in *Colas Est SA v France*¹³⁸ that the right to protection of one's home extended to business premises.¹³⁹ The Court has also allowed corporations to benefit from Article 10(1) which provides that:

[e]veryone has the right to freedom of expression. This shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.¹⁴⁰

¹³⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

¹³⁵ Michael K. Addo, 'The Corporation as a Victim of Human Rights Violations' in Michael Addo (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International, The Hague, 1999) 187-196, 194.

¹³⁶ Marius Emberland, 'Protection against Unwarranted Searches and Seizures of Corporate Premises under Art. 8 of the European Convention on Human Rights: the Colas Est SA V France Approach' (2003) 25 Mich J Int L 77.

¹³⁷ Peter T Muchlinski, 'Human Rights and Multinationals: Is there a Problem?' (2001) 77 International Affairs 31-48.

¹³⁸ App. No. 3797/97, Eur. Ct. H.R (Apr. 16, 2002).

¹³⁹ Emberland above n 136, 77.

¹⁴⁰ See for examples *Sundat Times v UK* A No 30, (1980) 2 ECHR 245; 45, *markt intern Verlag GmbH and Klaus Beermann v Germany* Series A No

In *Autronic AG v Switzerland*¹⁴¹ the Court held that

In the Court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10... The Article... applies to 'everyone', whether natural or legal persons.

Thus the corporation is treated under the law as a person with the ability to enjoy human rights.

It thus stands to reason that having acquired such a personhood, it should come within the social contract as a later entrant to join the State and the individual. If, as it is argued, that the modern corporation is a later entrant to the existing social contract, what then is its relationship to the existing contract? It is posited that its entrance is conditioned by the terms of the existing contract as it has evolved over time. Secondly it is argued that since the corporation becomes a beneficiary under the earlier contract it should have corresponding obligations the same way the earlier social contract regulates the relationship between individuals, society and government.

The Social Contract, the Law and International Human Rights Law

The social contract theory has influenced much of our contemporary law so much so that it is not possible to ignore it in the discussion of the social responsibility of corporations. As Palmer noted constitutions of many states have been explicitly or implicitly founded upon the principles of the social contract.¹⁴² However the most important implication in this connection is its relationship with international human rights law. The human rights concept as we have it today and the concept of inalienable rights have their origin in the social contract tradition. The UN Human Rights Charter implicitly assumed as its foundation the concept of a social contract. The human rights discourse is overpowering as a standard setting paradigm at all levels of human relations and it is based on the idea that there are rights inherent in every individual which are greater than the power of government and cannot be taken away by the government.

165, (1990) 12 EHRR 161; *Groppera Radio AG and Ors v Switzerland* A No 173, (1990) 12 EHRR 321.

¹⁴¹ Series A No 178 (1990) 12 EHRR 485.

¹⁴² Eric Palmer, 'Multinational Corporations and the Social Contract' (2001) 31 (3) *Journal of Business Ethics* at 245-258.

The idea of human rights can be traced to the concept of natural rights which is commonly used as a synonym for human rights.¹⁴³ There are two important ways in which human rights remains an offshoot of natural rights. Firstly, like natural rights it ascribes rights to people in their natural capacity as human beings i.e. merely being human justifies having certain entitlements. Secondly human rights provide standards by which we assess legitimacy of governments. Human rights are deemed to be beyond the prerogative of any authority. While aspects of human rights norms have been codified as binding legal instruments others are accepted as aspirational. An important point to note here is that human rights come with a duty imposed on others- if A has a right to life then B has an obligation not to take his life.

Human rights are described as the flip side of the duties under the social contract. It is a benefit derived from the social contract. The rights derived impose duties on all other members of the society and the government. If, as it is argued, the corporation is some kind of person and have all the attributes that allows the natural person to enter into the social contract and have subsequently been accorded rights attributable to the natural person, then it follows that it should be constrained in the same manner the natural person is constrained under the law including international human rights law. The argument is thus that the corporation as a person stands in the same position as the natural person *vis-à-vis* international human rights law and as such should have similar duties and responsibilities under international human rights law.

It is conceded that traditionally States were the subject of, and to a considerable extent, continue to be the subject of international law including international human rights law.¹⁴⁴ However as many commentators have pointed out, developments in the last century have accommodated intergovernmental organisations into the category and in the recent past individuals are becoming increasingly recognised as subject to international law¹⁴⁵ (and as participants in international law formation as radically suggested by Ochoa)¹⁴⁶.

¹⁴³ Grear, above n 62, 173; Peter Jones, 'Human Rights' in Edward Craig (ed) *Routledge Encyclopedia of Philosophy* (London: Routledge 2006) at <http://www.rep.routledge.com> last accessed 02/02/08; see also B H Weston 'Human Rights' (1984) 6(3) *Human Rights Quarterly* 258-259.

¹⁴⁴ M Shah Alam, 'Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study' (2006) 53 *Netherlands International Law Review* at 401; See also R A Mullerson, 'Human Rights and the Individual as Subject of International Law: A Soviet View' 1(1990) *European Journal of International Law* at 33, 40

¹⁴⁵ Ibid.

¹⁴⁶ Christina Ochoa 'The Individual and Customary International Law Formation' (2007) 48 *Virginia Journal of International Law* at 119

The jurisprudence that has emerged from the International War Crimes Tribunal at Nuremberg and Tokyo and the International Criminal Tribunals for Rwanda and Yugoslavia have confirmed these developments.¹⁴⁷ One of the main principles that emerged from the Nuremberg trials and that has emerged as a cornerstone of international criminal law is that anyone who commits an act which constitutes a crime under international law is responsible for it and therefore liable to be punished for it. In the trial of the German Major War Criminals (HMSO)¹⁴⁸ the Tribunal stated:

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected.

Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

This principle of individual responsibility was also affirmed under Article 7(1) and 33 of the Statutes of the International Criminal Tribunals for the former Yugoslavia and article 6(1) and article 22 of the Statutes of the International Criminal Tribunal for Rwanda.

Therefore, if the corporation has acquired a personhood status that enables it to enjoy rights accorded to the natural persons under both domestic and international law, it should be amenable to human rights norms like the natural person. In the light of these developments Kinley and Chambers have opined that

Considering the imposition of fundamental, international legal obligations on such non state-actors as individuals and armed oppression groups, it would be anomalous for companies to remain almost wholly outside the ambit of international law.¹⁴⁹

¹⁴⁷ Alam, above n 144.

¹⁴⁸ *The Trial of German Major War Criminals (HMSO)* –Judgment (Lawrence L.J): 30th September, 1946 -1st October, 1946 at 41-42

¹⁴⁹ David Kinley and Rachel Chambers, ‘The UN Human Rights Norms for Corporations: The Private Implication of Public International Law’ (2006) 6 *Human Rights Law Review* at 493.

It is instructive that in the US, the corporation having acquired significant natural person's status with the ability to enjoy constitutional rights protection, the developments in respect of the Alien Torts Claim Act litigation, which made corporations, to a limited extent, amenable to account for egregious human rights violations, is indicative of the possibility of the flip side of the personhood of the corporation under the social contract taking root.¹⁵⁰

Conclusion

This article contends that the arguments from other fields in the analysis of the social responsibility of corporations have been influenced by their understanding of what the law says the corporation is which they have largely confined to the artificial personhood perspective. The article showed how this is a limited understanding of legal theorisation in this regard. It is further argued that the CSR concept as presently construed by corporation and as demonstrated by emerging corporate practice is an acceptance of moral and social responsibility by corporation which the law should respond to appropriately. The article uses insights from the influential social contract theories in defining the moral responsibility of business. It is argued that having been accorded the status of the natural person under the law, the corporation is a later entrant into the social contract on the same footing with the natural person. This position is buttressed by the continuing extension of rights of the natural person to corporations in different jurisdictions. It is concluded that the modern corporation is treated as a natural person by its ability to enjoy human rights and this recognition should have reciprocal obligations by placing the corporation on the same footing with individuals *vis-à-vis* international human rights law. It is therefore posited that to the extent that international human rights law recognises individual responsibility, such responsibility should also be applicable to corporations.

¹⁵⁰ See Dickerson above n 7.